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# In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 127

UNIVERSAL BATTERY COMPANY,

PETITIONER

*v.*

THE UNITED STATES,

RESPONDENT.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## BRIEF ON BEHALF OF PETITIONER

### THE ACTION OF THE COURT BELOW

The Court below, the Court of Claims, rendered no opinion. The dismissal of the petition in that court is recorded in Volume 66, Court of Claims Reports. The Findings of Fact and Conclusions of Law upon which the action of the Court of Claims was predicated are given in the record herein at pages 17-26.

## JURISDICTION OF THIS COURT

The judgment of the Court of Claims was rendered on December 3, 1928 (R. 17). The petitioner's motion for a new trial made on January 7, 1929, was overruled by that Court on March 11, 1929 (R. 26). The defendant's motion for permission to file motion requesting amendment of findings of fact was overruled May 6, 1929 (R. 26). The petition to this Court for Writ of Certiorari was filed on June 4, 1929, and was granted October 14, 1929. The writ was issued by this court under Section 240 of the Judicial Code as amended by Section 3 (b) of the Act of February 13, 1925 (43 Stat. 938).

## THE QUESTION PRESENTED

The sole question in this case is whether the electric storage batteries manufactured and sold by this petitioner to any person other than an automobile manufacturer or producer, are "parts or accessories" of automobile trucks, automobile wagons, other automobiles and motor cycles, within the meaning of the statutes taxing the sale of such parts or accessories.

## STATUTES AND REGULATIONS INVOLVED

*Statutes.*

The Revenue Act of 1918 (c. 18, 40 Stat. 1057) and the Revenue Act of 1921 (c. 136, 42 Stat. 227) contain materially identical provisions with respect to the ques-

tion involved in this case and are as follows:

"Section 900. On and after February 1, 1919 [1918 Act; 'January 1, 1922,' 1921 Act] there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following per cent of the price for which so sold or leased:

"(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or the sale thereof) 3 per centum.

"(2) Other automobiles and motor cycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum.

"(3) Tires, inner tubes, parts or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum."

*Regulations of Treasury Department.*

Regulations 47 promulgated by the Commissioner of Internal Revenue, in pursuance of the authority granted by Congress, provided in part as follows with respect to what constitutes a "part for an automobile truck, automobile wagon, other automobile, or motor cycle," i. e.

"Art. 14. * * * Any article which has reached a state of manufacture wherein it is in itself a component part or accessory, and is of such a nature that it may be used or attached by an ordinary repair man or individual user as distinguished from a manufacturer or producer, is subject to tax as a 'part' or 'accessory.'"

* * * * *

"Art. 15. * * * any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use and which is primarily adapted only for use as a component part of such vehicle."

* * * * *

"Articles, however, which ordinarily would be classed as commercial commodities, become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicles."

"Component parts of articles taxable under this definition are taxable when sold separately, if they have reached such stage of manufacture that they are primarily adapted for use as such a component part."

Art. 16 provides: "An accessory for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed to be

attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation."

* * * * *

"Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles, or motor cycles are not subject to tax as 'parts' or 'accessories.'"

## STATEMENT OF THE CASE

The facts in this case are fully set out in the Special Findings of Fact (R. 17-26) made by the Court below. In brief they are:

The petitioner is, and has been since 1913, manufacturing and selling storage batteries and storage battery parts. During the period from March 3, 1919, to October 30, 1923, the petitioner paid to the respondent manufacturers' excise taxes, penalties and interest in the sum of $27,872.61 upon the sale, to persons other than manufacturers or producers of automobile trucks, automobile wagons, other automobiles and motor cycles, of electric storage batteries under Section 900, subdivision (3), of the Revenue Acts of 1918 and 1921. The Commissioner of Internal Revenue, on May 15, 1924, denied a refund claim for this amount with interest. The petitioner brought action in the Court of Claims on October 3, 1924,

for the refund claimed except for $2,566.31, admittedly barred by the statute of limitations. (R. 17-21, Par. I-IV).

The batteries sold by petitioner, during the period in question, were of the same type and kind as had been used, long before the advent of the automobile, in innumerable mechanical devices, where a readily accessible and dependable flow of electric current is required. Prior and subsequent to the employment of such batteries in the automobile they were used in signal apparatus, stationary gasoline engines, motor boats, tractors, lighting plants, airplanes, mining cars, railway switches, wireless, telephones, telegraph, radios, fire alarms, door bells, electro-plating, etc. (R. 23. Par. VII-VIII).

A technical description of the composition and function of the batteries manufactured by the petitioner can be found in the Special Findings of Fact V and VI of the Court below. (R. 22.)

The batteries manufactured by the petitioner reached the consumer through battery distributors, jobbers, garage men, accessory dealers, and radio dealers. The petitioner could not know to what use its batteries would be put when sold by it. The petitioner cannot tell what percentage of its batteries are used for any particular purpose. (R. 23, Par. IX.)

No automobile required petitioner's batteries as standard equipment. Any one of the several types of batteries manufactured by the petitioner could be adapted for use in some make of automobile. None of the batteries were made for use in any particular automobile

unless the purchaser specifically requested it. Some arrangements of cells might limit the petitioner's batteries to some automobile but would not limit them for the other uses. (R. 24, Par. X.)

The terminals on a battery determine the purpose for which the battery may be used. The petitioner did not manufacture such terminals. Ninety-nine per cent of its product left its factory without any terminals. The petitioner did not know what sort of terminals were going on its batteries after they were sold. (R. 24, Par. XI.) It does not appear that the petitioner's batteries were especially designed or primarily adapted for use on any of the vehicles designated in the taxing statute.

Upon these facts the Court of Claims, in its Conclusion of Law, found that the electric storage batteries sold by the petitioner were parts or accessories for automobile wagons, automobile trucks, automobiles or motor cycles and subject to tax. It dismissed with costs the petitioner's claim for a refund of the taxes paid. The Court cited, as a single authority, without discussion, *Cole Storage Battery Company vs. United States*, 65 *Ct. Cls.* 164.

## SPECIFICATION OF ERRORS TO BE URGED

I. The Court of Claims erred in finding that the electric storage batteries manufactured and sold by the petitioner were parts or accessories of automobile trucks, automobile wagons, other automobiles or motor cycles and subject to the excise tax on the sale of such parts or accessories.

(a) The Court of Claims erred in its implied finding

that the material facts in this case are the same as those in *Cole Storage Battery Company vs. U. S.*, 65 *Ct. Cls.* 164, and in rendering judgment against the petitioner upon such grounds.

(b) The Court of Claims erred in its implied finding that the rule announced in *Cole Storage Battery Company vs. U. S.*, 65 *Ct. Cls.* 164, is a correct statement of the intent of the statute involved in this case and in rendering judgment against the petitioner upon such ground.

(c) The Court of Claims erred in failing to decide that the petitioner is entitled under the law to judgment.

## SUMMARY OF ARGUMENT

It is the petitioner's contention:

(A) That the material facts in the petitioner's case are so essentially different from the facts found in *Cole Storage Battery Company vs. U. S.*, 65 *Ct. Cls.* 164, cited by the Court below as authority for its decision in the case at bar, that it is reversible error to apply the rule in that decision to the facts in this case.

(B) That the rule of law announced by the Court below is not a proper statement of the law applicable to this case for the reason that:

(1) The absence from Section 900, subdivisions (1), (2) and (3), of the extensive language used elsewhere in Sections 900, 907 of the statutes involved, negatives any intent to tax as parts or accessories for automobiles, etc., any articles other

than those which are strictly parts of the vehicles taxed.

(2) The rule of law evolved below is in direct conflict with the principle that the accepted use of the nomenclature involved shall be employed to determine the limits of the taxing clause.

(3) The rule evolved below is in material conflict with the "usage" doctrine developed by this court to determine taxable classifications.

(C) The proper rules of interpretation demonstrate that the electric storage batteries sold by this petitioner are not parts or accessories for automobiles, etc., and are not taxable as such.

## ARGUMENT

(A) *The material facts in the petitioner's case are so essentially different from the facts in the case cited by the court below as controlling that the cited case is not authority for the decision made in this case.*

The Conclusion of Law of the Court of Claims deciding against the plaintiff is issued without discussion save for the reference, "See case of Cole Storage Battery Company, 65 Ct. Cls. 164." Below are recited what appear to be the determinative facts in that case. Directly beneath the statement of each determinative fact in the Cole Storage Company case we point out the contrast in the case at bar.

1. In the Cole case it was found, "Plaintiff during the period involved in this suit, manufactured and sold

lighting and starting batteries which were designed for the special purpose of being used to replace a component part for automobiles."

In the case at bar the petitioner did not sell batteries designed for the special purpose of being used to replace a component part for automobiles. It was found, as a fact, that no automobile manufacturer used the petitioner's batteries as standard equipment. It was found that no battery of the petitioner was made to fit any particular automobile unless specially ordered. It was found that any arrangement of the cells on the petitioner's batteries did not limit them for other uses than on automobiles.

2. In the Cole case, it was found: "Plaintiffs' business policy was to manufacture a battery which would be used on any make of automobile equipped with a storage battery."

In the case at bar it was not found that it was the petitioner's business policy to manufacture a battery which would be used on any make of automobile. As a fact, it was found that the petitioner had no means of knowing at the time of sale for what purpose its batteries would be used. The petitioner did not know what percentage of its batteries were used for any particular purpose. Finally, it was found that the batteries manufactured by the petitioner had straight terminal posts and that the petitioner did not know what kind of terminals (a feature which determines the use for which the battery is employed) were going to be put upon its batteries after they were sold.

3. In the Cole case it was found: "Plaintiff specialised on a battery with thin plates, as this would tend to produce a battery with more spontaneous action for the starting device of any automobile."

In the case at bar the petitioner did not specialize on a battery with thin plates to produce more spontaneous action for the starting device of automobiles. There was no finding to this, or any similar effect.

4. In the Cole case the court said: "* * * [This] manufacturer of storage batteries seeks the custom of the automobile trade, assures the latter of the especial qualifications of his battery, and designs it as a part of the automobile into which it is to be introduced * * *."

It was not found that the petitioner sought the custom of the automobile trade as distinguished from any other trade. It was not found that the plaintiff designed its battery as part of the automobile into which it might be introduced.

While both the Cole Storage Battery Company and the petitioner made and sold electric storage batteries, we find it impossible to discover from a review of the determinative factual findings of the Court of Claims in these two cases, any substantial similarity between the design of the batteries, the intended purposes and sale policies, of their makers. When the Court of Claims decided the instant case against the petitioner it must either have confused the petitioner's design, batteries, and business policy with those of the Cole Storage Battery Company, or else it was acting upon the hypothesis that all storage batteries, at the very moment of manu-

feature, are parts or accessories of automobiles.

Upon either alternative there was error. There is no indication whatever that the petitioner's batteries were designed, were adapted, or were sold for the special purpose found in the case of the Cole Storage Battery Company's batteries. No matter how well decided the Cole case may have been, that case, with its references to the special purpose of being used in automobiles, can afford no authority for the decision in the case of the petitioner whose electric storage batteries were neither so designed nor sold.

It should be apparent that the facts in the petitioner's case are so essentially different from the facts found in the Cole Storage Battery Company's case that it is reversible error to apply the rule evolved in that decision to the facts in this case.

(B) *The doctrine announced by the court below is not a correct statement of the law applicable to the case at bar and similar cases.*

The doctrine in *Cole Storage Battery Company vs. United States*, 65 *Ct. Cls.* 164, cited by the Court below as the single authority for its decision, seems to be fairly stated in the words employed by the Court of Claims in its opinion in that case, i. e.

> "This case in our opinion turns upon the restricted issue as to whether a storage battery, especially adapted for and so designed and advertised as to meet the essential requirements of locomotive power, is a part or accessory of an automobile. The fact that a storage battery is

> available for use for a number of purposes other than for an automobile, or, that its creation antedated the invention of the automobile, is not determinate of the issue. A variety of parts of an automobile are susceptible of use in other devices, and other parts, both as to form and functioning elements, existed long prior to the coming of the automobile itself. What seems to us to turn the contention is the fact that in a combination of various elements to function in a certain way the accomplishment of the purpose is only attainable where a gasoline engine is used by coupling certain elements up with a storage battery, and without its presence the mechanism is useless. We think, therefore, that where a manufacturer of storage batteries seeks the custom of the automobile trade, assures the latter of the especial qualities of his battery and designs it as part of the automobile into which it is to be introduced, Congress intended by the taxing act to reach it as a source of revenue."

That opinion predicates the decision of the case simply upon criteria of use and intended use of the article in question. The court says that what constitutes a part, or accessory, of an automobile, etc., is determined by: (1) advertisement that the article will meet the essential requirements of an automobile; (2) design and adaptation of the article to meet the essential requirements of an automobile (although admittedly available in that design and adaptation for a number of purposes other than for an automobile); (3) the necessity of the presence of the article for an automobile to function; (4) the

circumstance that the automobile trade is one of the markets sought by the maker. Has not the court below, in a resume of the evidence, lost sight of the principles of law involved?

Our contention is that neither the terms employed in the statute nor the principles established by this court for determining taxable classifications will support the rule evolved by the Court below from the criteria recited.

*The Language of the Statute Generally.*

*The absence from Section 900, subdivisions (1), (2) and (3), of the extensive language used elsewhere in Section 900, 907 of the statutes involved, negatives any intent to tax as parts or accessories for automobiles, etc., any articles other than those which are strictly parts of the vehicles taxed.*

The 1918 statute—Excise Taxes, Sections 900, 907*—proposes a tax, not upon all sales of commodities, not a general sales tax, but a tax upon the sale of specific articles and classes of articles definitely named and apparently selected with care. That Congress was familiar with inclusive and generic clauses and that the draftsmen of the bill were capable of expressing all the inclusions intended is evidenced by the following clauses of this character employed, i. e. (emphasis ours):

"Sec. 900. * * * (4) Pianos, organs * * * and records *used in connection with any* musical in-

*See Appendix I

strument, piano player, graphophone, phonograph, or talking machine, * * *"

"Sec. 907 (a) * * * (1) Perfumes, essences, extracts * * * *or any similar substance, article, or preparation by whatsoever name known or distinguished, any of the above which are used or applied or intended to be used or applied for toilet purposes;"

These clauses quoted are expansive, they imply a broad inclusion, an omnibus intention. Such clauses, occurring in such close proximity, were readily at hand to be applied to expand "parts, and accessories therefor" in Subdivisions (1), (2) and (3), Section 900, if there had been any such intent upon the part of the Congress.

If Congress had intended that all commodities which could be used as parts of automobiles, were to be taxed, the most natural action would have been to borrow from the immediately neighboring subsections of the statute clauses which would express that intent. The statute might have read, for example, "parts or accessories *used in connection with any*† automobile, automobile truck, * * *." Even better would have been "parts, or accessories, *or any similar substance, article, or preparation by whatsoever name known or distinguished which are used or applied or intended to be used or applied*†† upon automobiles, automobile trucks * * *."

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†Borrowed from Section 900 (4)

††Borrowed from Section 907 (a) (1)

Is not the absence of one of these omnibus clauses from "parts or accessories therefor" significant as to the breadth of inclusion intended?

If the intention was to tax electric storage batteries, which are equally parts of many devices besides automobiles, would not one expect to find those other devices of which the batteries are a part also taxed? There is no mention in the taxing statutes, however, of a tax on signal apparatus, stationary gasoline engines, lighting plants, airplanes, mining cars, railway switches, etc., etc. Was it the intention to tax parts of these machinery assemblies and not the assemblies themselves? It could hardly be the intention to tax, not all the parts of these assemblies, but only the parts of such non-taxed assemblies which could be used in automobiles.

If it were the intention to tax electric storage batteries, which are themselves important commercial commodities, made up from a number of parts, why were they not specifically named? Certainly they are of a commercial importance equal to that of many other articles specifically named, e. g., polo mallets, skiis, sword canes, carafes, fans, sunshades, lorgnettes, etc. If the automobile had never been invented the electric storage battery would still be a commodity so extensively bought and sold that a substantial tax could have been raised upon such sales. Why such an indefinite, circuitous description if it were the intention to tax such a familiar device?

Even if there were no other more convincing guides to ascertaining the intention of the legislature, we submit that, in view of the surrounding language in the statutes

involved, the designation of other articles to be taxed and the omission of still other articles of which electric storage batteries are a part, it is correct to conclude that the inclusion of such batteries as parts or accessories for automobiles and the vehicles named in the statute is unwarranted and a holding for such inclusion is a reversible error.

*Established Tax Classification Doctrines.*

Assuming, however, for the sake of the argument, that our interpretation of the statute is not satisfying, to what key are we to turn? The statute directs an excise duty upon the sale of an article. It is upon that article and what it is at the moment it is sold that the tax attaches. The question is, does this article bear a duty or is it upon the "free list." That problem is a familiar one to this Court. Indeed it is difficult to avoid the belief that Congress tacitly intended that disputes as to the definition of terms in the legislation under review should be decided under the doctrines already developed by this Court for such purposes. Let us consider these principles as applied to the decision of the Court of Claims in this case.

*The Nomenclature Rule.*

*We submit that the rule of law evolved below is in direct conflict with the principle that the accepted use of the nomenclature involved should be resorted to in determining the limits of the taxing clause.*

One recognized method upon which Congress may fairly be presumed to have relied, for classifying the article

in question, is to discover whether the commercial, or ordinary and commonly accepted, name of the article brings it within the terms of the tax. *(Chew Hing Lung & Co., vs. Wise,* 176 *U. S.* 156; *Sonn vs. Magone,* 159 *U. S.* 417; *DeJonge vs. Magone,* 159 *U. S.* 562; *Hartranft vs. Meyer,* 149 *U. S.* 544; *Maillard vs. Lawrence,* 16 *How. (57 U. S.)* 251; *U. S. vs. Massachusetts General Hospital,* 100 *Fed.* 932; *Philadelphia Storage Battery Co., vs. Lederer, Collector,* 21 *Fed. (2nd)* 320.) While some of these cited cases are concerned with whether the commercial name or the common name shall prevail for purposes of definition, that issue is not involved in the case at bar for the reason that there is no difference between the meaning and implication of the trade term "electric storage batteries" and the term "electric storage batteries" in common speech.

In *Philadelphia Storage Battery Company vs. Lederer, Collector,* 21 *Fed. (2nd)* 320, District Judge Dickinson, had under consideration the identical statutes here involved. Further, he was considering whether electric storage batteries, the identical articles now before us, were subject to tax under these statutes as parts or accessories for automobiles, etc. He approaches the problem from the angle of identifying the article sought to be taxed by the accepted meaning of the language Congress employed in describing the thing taxable. His view is that "parts, or accessories, therefor," is a part of the name of the article. He gives an example.

> "For illustration, among the things taxed are tires. The full name given the thing to be taxed

> is a 'tire for an automobile' or in other words, an 'automobile tire.' If there is a thing known to the trade as an automobile tire, or as a tire for automobiles, then that is the thing taxed. If there is no such known thing (that is no thing thus known) then there is nothing to which the tax can attach and you cannot tax something else on the plea that it is a thing which will serve the purpose of a tire on an automobile."

Turning then to electric storage batteries Judge Dickinson says:

> "Our finding is that there is no such thing as an 'automobile storage battery' or a 'storage battery for automobiles' in the nomenclature of the trade and no 'article' or thing so known. It follows that the plaintiff did not make or sell any. What it sold were 'storage batteries' and these are not taxed by the Act. The construction which we give to the phrase 'sold for automobiles' is not anything which the seller or buyer intends for automobile use or that which is in fact so used nor anything which is adapted to such use but it is whether the thing attempted to be taxed can be identified as the thing which the law has taxed by the name or descriptive phrase used in the law."

In selecting the identification through the nomenclature rule, the District Judge was not unmindful of the principle of identification through use. Concerning the taxpayer's contention that if storage batteries are commercial articles generally for a varied use including auto-

mobile purposes, then they cannot be for automobile use for the reason that they are for other uses also, the court says:

> "If this is the correct view, the plaintiff should have judgment because we have found that storage batteries do have these other uses for which they are sold in the ordinary course of business. To this we add the further finding to which the plaintiff gives some emphasis, that storage batteries were in use before the automobile and would be made and sold today if the automobile had never come into existence."

There can be but little doubt as to the character of the decision in the case at bar if it had been tried in Judge Dickinson's Court. It is to be regretted that the government did not appeal his cited decision in order that a rule so fundamentally sound might have been affirmed at an earlier date.

There is good warrant for the application in the Philadelphia Storage Battery Company case of the nomenclature test to determine classification. In *Maillard vs. Lawrence*, 16 *How. (57 U. S.)* 251, the question was whether shawls were imported under that section of the tariff act imposing a duty on "wearing apparel" or under that section relating to "manufactures of silk, or of which silk shall be component material." The court held that the commonly accepted meanings of "shawls" and "wearing apparel" was too clear to permit of successful dispute and the circumstance that the shawls are sometimes used to be worked into vests cannot deprive them

of their character at the moment of importation as wearing apparel within the commonly accepted meaning of the term.

In *Chew Hing Lung & Co., vs. Wise*, 176 *U. S.* 156, the question was whether imported tapioca flour, being one of the three commercially known forms of tapioca, came within the classification "tapioca" on the free list, or constituted a "starch, including all preparations from whatever substance produced, fit for use as starch,". It was shown that tapioca flour could be used for starch, was used by Chinese laundrymen for this purpose and by calico manufacturers and carpet makers to thicken colors, and sometimes for sizing cotton goods. Chemically the article was a starch.

This court concluded that the article questioned was on the free list. The principal reason assigned was that tapioca flour was commercially known as "tapioca" and was not commercially known as starch nor any preparation fit for use as starch, and Congress must be judged to have used the term as it is used by those who regularly employed it in the commerce where it was used.

To the same effect see *Sonn vs. Magone*, 159 *U. S.* 417, where lentils and beans are classified as "vegetables" rather than as "seeds" because they are commonly regarded as vegetables although botanically they are seeds. In *DeJonge vs. Magone*, 159 *U. S.* 562, a product made of paper and other materials but known in the trade as "fancy paper" is, chiefly because of this commercial description, classified as "paper" rather than as a "manufacture of paper." See also *Hartranft vs. Meyer*, 149 *U.*

*S.* 544, where the question of whether "chinas" or "marcellines," used in the manufacture of hats, are "trimmings for hats" depends upon the natural use of the word "trimmings." Also *U. S. vs. Massachusetts General Hospital,* 100 *Fed.* 932, where it is determined that in normal understanding surgery is a science; hence surgical instruments are "scientific" instruments in the common use of the term.

The principle evolved in these cases clearly is that in fixing the intent of Congress as to whether an article should come within or without a tax imposed, either the trade, or common name, of the article, is determinative. So far as the case at bar is concerned, not only is there no trade term "automobile batteries" but there is no such popular combination of words. Electric storage batteries are sources of electric current. This meaning of the name was familiar to the layman long prior to the arrival of the automobile. The automotive industry has been far from absorbing these commercial commodities and thus causing any change in the words everywhere used to describe them.

Regardless of whether the commercial connotation, or the popular interpretation, be placed upon the terms employed, the phrase "automobile batteries" has no currency. Hence storage batteries are not parts or accessories for automobiles, automobile trucks and wagons or motor cycles any more than they are parts for many totally different things. It is submitted the Court below erred in not applying the accepted use of the nomenclature involved to determine the limits of tax classification.

*The "Usage" Doctrine.*

*The decision below is in direct conflict with the "usage" doctrine developed by this Court to determine taxable classifications.*

While we believe that this case would be properly decided upon the principle employed in *Philadelphia Storage Battery Company vs. U. S.*, 21 *Fed. (2nd)* 320, there is, upon the authority of the decisions of this Court, a doctrine affording even stronger support for the petitioner's contention. That rule, reduced to its essentials, is this:

> If the article in question is commonly, practically and generally used upon a given device it is a part or accessory of that device, *provided*, it is not commonly, practically and generally used for other purposes and in other devices.

See *Maillard vs. Lawrence*, 57 *U. S. (16 How.)* 251; *Hartranft vs. Langfeld*, 125 *U. S.* 128; *Worthington vs. Robbins*, 139 *U. S.* 337; *Cadwalader vs. Wanamaker*, 149 *U. S.* 532; *Walker vs. Seeberger*, 149 *U. S.* 541; *Hartranft vs. Meyer*, 149 *U. S.* 544; *Magone vs. Heller*, 150 *U. S.* 70; *Sonn vs. Magone*, 159 *U. S.* 417; *Magone vs. Weiderer*, 159 *U. S.* 555; *Atwater-Kent vs. U. S.*, 62 *Ct. Cls.* 419; *Milwaukee Motor Products Company vs. U. S.*, 66 *Ct. Cls.* 295; *Berg Brothers Manufacturing Company vs. U. S.*, 67 *Ct. Cls.* 165.

The historical development of the doctrine in this Court

is not difficult to trace even through its expression in varying forms such as "primal use," "predominant use," "chief use," etc.. As is to be expected, the decisions of this Court affecting the usage doctrine relate, with the exception of certain cases arising under the Munitions Tax Act of 1916, to disputes over the classification of articles and commodities under the tariff laws. Administratively, the problem in the case at bar is the same as in the tariff act decisions. That is to say, in the tariff cases the question is what is the exact character of the article at the moment it is imported: in the excise cases the question is what is the exact character of the article at the moment it is sold.

In *Maillard vs. Lawrence*, 16 *How. (57 U. S.)* 251, (Decided December Term 1853), there is an early, if not the first, resort to discovering the utility and function of an article in order to determine what it is. In that case the question was whether the tariff impost should be upon shawls and scarfs as "clothing ready made and wearing apparel of every description," or whether shawls and scarfs should be classified as "manufactures of silk or of which silk shall be component material * * *". The plaintiff advanced an argument that the articles were not wearing apparel because they were sometimes purchased by tailors and clothiers and worked up into vests and dressing gowns. Upon this contention Mr. Justice Daniel concludes:

> "This position might, with equal propriety be urged with reference to any article of wearing apparel whatsoever which should be diverted from

its *primal* and *regular use* and design." (Emphasis ours.)

The case may be said to stand for the proposition that the achieved character of an article is not to be altered by *occasional* devotion to other uses.

In *Hartranft vs. Langfeld*, 125 *U. S.* 128, (Decided March 19, 1888), the question was whether imported ribbons constituted "trimmings * * * used for making or ornamenting hats * * * " under a given tariff classification, or whether they were articles "made of silk or of which silk is the component material of chief value," under another classification. That the goods were "trimmings" there was no controversy, but the evidence was that while they were used for making or ornamenting hats, they were also used for trimming dresses. The importer requested that the jury be instructed:

> "I. That if the jury find the goods in question are used for making or ornamenting hats, their verdict should be for plaintiffs,"
>
> * * * * *
>
> "IV. That if the jury find the goods in question are known and used as hat trimmings, used for making or ornamenting hats, although they may be used from time to time for other purposes, their verdict should be for the plaintiffs."

The defendant (the Collector) asked for an instruction reading:

> "That unless the jury should find that the goods in question are not specifically provided for, and

> that by their style and character they are fitted only for use for making or ornamenting hats, then your verdict should be for the defendant."

The Court below avoided both Scylla and Charybdis, however, and instructed the jury in material part as follows:

> "It is the *use* to which these articles are *chiefly adapted*, and for which they are used, that determines their character within the meaning of this clause of the Tariff Act * * *. It is the *predominant use* to which articles are applied that determines their character * * *. You will, therefore, determine to which use these articles in question are chiefly devoted * * *. The question is simply and purely one of fact, namely, what is the *predominant use* to which these articles are devoted." (Emphasis ours.)

This Court affirmed the judgment of the Court below without citation of authority. The decision, however, is a direct development of the finding in *Maillard vs. Lawrence*, 16 *How. (57 U. S.)* 251, cited above, to the effect that it is the regular, practical and general use of the article as distinguished from occasional uses for other purposes that determines its character.

For the repeated decisions of this Court to the same effect as the foregoing *Hartranft vs. Langfeld*, and dealing with the same subject matter, see *Robertson vs. Edelhoff*, 132 *U. S.* 614; *Cadwalader vs. Wanamaker*, 149 *U. S.* 532; *Walker vs. Seeberger*, 149 *U. S.* 541; *and Hartranft vs. Meyer*, 149 *U. S.* 544.

In *Worthington vs. Robbins*, 139 *U. S.* 337, (Decided March 30, 1891), the converse of the rule in *Hartranft vs. Langfeld*, 125 *U. S.* 128, and the cases cited above which follow it, is declared on an article which had not yet reached that stage of development where its common, general, practical, predominant, or chief use, could be designated for a single purpose. In that case a substance known as "white hard enamel" was imported admittedly for use in surfaces of watch dials. Before, however, the material could be used for any practical purpose, it was necessary to grind and pulverize it and apply additional processes of manufacture. The form and condition of the merchandise as imported, afford no evidence or indication of the particular use to which it was to be applied.

The issue was whether the material was "watch materials" under the Tariff Act, or an article "manufactured in whole or in part, not herein enumerated or provided for."

Mr. Justice Blatchford, denying that the article was "watch materials" says that the article in question

> "is used for various purposes, including the making of faces or surfaces of watch-dials, scale-columns of thermometers, faces or surfaces of steam-guage dials, and for other purposes when a smooth or enameled surface is desired. It thus appears that it was not used exclusively for the making of faces or surfaces of watch-dials; and, although it is stated in the statement of agreed facts that the enamel in controversy was imported by the plaintiffs for use in making watch dials and was in fact

> so used, there was nothing to prevent them from selling it to persons who would use it for the other purposes for which it is stated it is used."

In this decision we have this Court refusing to accept the intent of the buyer of the article and his subsequent actual use of it, as determinative of the character of the article when it has not yet achieved characteristics which limit it to one use. In other words, neither intended nor actual future use will classify an article for that use alone when such an article commonly, generally and practically has uses for various purposes.

In October of 1893, the case of *Magone vs. Heller*, 150 *U. S.* 70, was decided by this Court. The question was whether material imported as "manure salts" came within the clause "potash, sulphate of" or "chemical products * * * expressly used for manure." The facts indicated that the article was in fact sulphate of potash, but that it was used for manure. The defendant collector moved the court below to allow the case to go to the jury upon the question of whether the article was a "substance expressly used for manure." The Court denied this motion and directed a verdict for the plaintiffs.

Mr. Justice Gray, announcing the decision of this Court that the question should have gone to the jury, declares:

> "If the only common use of a substance is to be made into manure, or to be itself spread upon the land as manure, the fact that occasionally, or by way of experiment, it is used for a different purpose, will not take it out of the exemption.

> But if it is *commonly, practically* and *profitably used* for a different purpose, it cannot be considered as "expressly used for manure," even if in the majority of instances it is so used." (Emphasis ours.)

Thus is the "usage" rule laid down in full maturity.

It remained only for the case of *Magone vs. Weiderer*, 159 *U. S.* 555, decided November 18, 1895, to make it definite and certain, that the developed rule announced in *Magone vs. Heller*, 150 *U. S.* 70, was the correct expression of the doctrine "where use becomes the criterion." In *Magone vs. Wiederer*, pieces of glass with beveled edges were imported. The importer claimed that they were "parts of clocks." The Collector claimed they were "articles of glass, cut, engraved." Evidence showed that the glass had been ordered from abroad, cut and manufactured to sizes suitable for clocks, and beveled so as to be ready for fitting into the frames of clocks, as a regular course of business, which had been continuing for some time, between the glass manufacturer and the importer. There was evidence tending to show that like pieces of glass were sometimes used by manufacturers of hand mirrors, carriage manufacturers, lamp makers and for other objects. The Collector, whose counsel apparently was not familiar with the decisions of this Court, requested the Court below, in substance, to find in favor of the Collector unless the evidence showed that the pieces of glass in controversy were used absolutely and exclusively for clocks and no other purpose. The Court, below, cognizant of the law as laid down by this Court, charged in part:

"The Supreme Court in a case which I think is somewhat similar upon the facts, although relating to different sections of the statute, sustained a charge to the jury 'that the use to which the articles were chiefly adapted and for which they were used determined their character within the meaning of the statute * * *.' And so I will say to you, as the law of the case, as I understand it, that if you find that these articles were chiefly used as parts of clocks that that would determine their tariff classification. But it is entirely clear, upon the other hand, that they must be chiefly and principally used for that purpose. If they are articles, all, or one or more, as the case may be, which have no distinguishing characteristics, which are just as applicable for use in fancy boxes or in coach lamps as they are for clocks, just as applicable to the one use as to the other, then it would be entirely proper to say that they have no distinguishing characteristics as parts of clocks. They might be used for one purpose just as well as for another. And if you find as to those articles, or any of them, that they have *several uses to which they are perfectly applicable*, then as to those articles your verdict should be for the defendant." (Emphasis ours.)

Chief Justice White approves the charge given by the Court below and declares that the doctrine expressed in *Magone vs. Heller* was consistent with all the prior decisions of the Court and that the terms "*commonly, practically, and profitably used,*" are to serve as a guide as to what constitutes "chief use."

From the rule as stated in *Magone vs. Heller*, and thus

reaffirmed in *Magone vs. Wiederer*, this Court has never departed. The lower courts have repeatedly employed with success these principles in solving the questions which came before them. See, for example, *U. S. vs. Riga*, 171 *Fed.* 784; *U. S. vs. U. S. Express Co.*, 94 *Fed.* 642. These two decisions in the lower courts illustrate, in converse circumstances, the operation of the "usage" doctrine.

In *U. S. vs. U. S. Express Company*, 94 *Fed.* 642 (Circuit Court, S. D. N. Y.), the question was whether imported strips of pearl should be classified as "parts of knives wholly or partly manufactured" or "as manufactures of mother-of-pearl, not specially provided for." The United States contended that inasmuch as the pearl was shipped in certain sizes and its chief use was for knife handles that they were so classified. It appeared, however, that the articles were sold in all sizes and shapes and used on fans, opera glasses, button hook handles, cork screws, and other articles. The Court pointed out that in their condition when imported the strips of pearl were not necessarily a part of a knife handle and required further shaping for the purpose. Hence, they were nothing more than material from which pocket knives may be manufactured. The court declared that the principle in *Worthington vs. Robbins*, 139 *U. S.* 337, where "white hard enamel" had not attained a character where its chief use was for watches, clearly controlled. In other words, it could not be said that there was not for these strips of pearl at the moment of their importation, a common, general and practical use for other purposes than for parts

of pocket knives. The Court so decided.

In *U. S. vs. Riga*, 171 *Fed.* 783 (Circuit Court, D. Massachusetts) (Decided June 11, 1909), rough rifle barrel forgings were imported. The question was whether they should be classified as "manufactures of metal" or "rifles and parts thereof." The contention was that these forgings could not constitute parts of rifles until they were in a finished condition complete and ready for adjustment. The Court, quoting the Board of General Appraisers, pointed out that the forgings at the time they were imported, were "fit for no other useful purpose than as a part of a rifle." This finding obviously concluded the inquiry under the chief use doctrine. As distinguished from the "white hard enamel" in *Worthington vs. Robbins*, 139 *U. S.* 337, and *U. S. vs. U. S. Express Company*, 94 *Fed.* 642, where strips of pearl had not yet taken the peculiar characteristics required for pocket knife handles, the rough forged rifle barrels could not be used for any other practical use. Hence, it was inevitable that their common, practical, and general use must be for rifle barrels alone and that they were parts thereof.

By the year 1920 two cases had reached this court requiring interpretation of the Munitions Manufacturers' Tax Act of September 8, 1916. (39 Stat. L. 463, p. 781.) That act declared:

> "that every person manufacturing projectiles, shells, or torpedos * * * or any part of any of the articles mentioned * * * shall pay an excise tax * * * upon the entire net profits actually received or accrued * * * from the sale or disposition of such articles * * * ."

In *Worth Brothers Company vs. Lederer*, 251 *U. S.* 507, and in *Forged Steel Wheel Company vs. U. S.*, 251 *U. S.* 511, both decided on March 1, 1920, the questions raised were identical. In these cases certain principal contractors supplied finished explosive shells to the French and British governments respectively. It was the function of both plaintiffs to supply the rough forgings for shells in a condition to which the principal contractors could apply their manufacturing processes and finish the forgings as the completed article under the contract. Worth Brothers Company, before delivering the shells to its principal contractor, completed 6 of the successive manufacturing processes necessary to complete the shell.

> "the fifth took the fluid metal [the result of the second step] from the possibility of use for general commercial purposes, and by a forging process restricted the steel to the field of use for shells."

While this Court did not find it necessary so to say, there was unquestionably at this point the same factual situation disclosed in *U. S. vs. Riga*, 171 *Fed.* 783, where rough forged rifle barrels could be employed for no other practical purpose than completion as rifle barrels. Hence, the rule of chief use, i. e. that there was no common, general, or practical use to which these rough shell forgings could be devoted other than to completion, as finished shells, made them clearly and unmistakably parts of shells. As such parts of shells, the profit resulting from their sale was obviously taxable to the plaintiffs.

In the companion case of the *Forged Steel Wheel Com-*

*pany*, 251 *U. S.* 511, that subcontractor carried the forgings through to the point where there was a hollow steel body, or shell form, of a suitable composition, shape and length, from which to make the projectile contracted for. This was the equivalent to the sixth step performed by Worth Brothers Company under their contract. Hence, the forgings were necessarily brought to a point where they could be used for no other practical purpose than for completion of the finished shell called for in the principal contractor's agreement. Here again there was no common, practical, or general use for these forgings other than in steel shells, and under the chief use rule they were parts of such shells.

While in neither *Worth Brothers Company vs. Lederer*, 251 *U. S.* 507, nor *Forged Steel Wheel Company vs. Lewellyn*, 251 *U. S.* 511, did this Court see fit to decide the questions on the basis of the established chief use doctrine, it should be obvious that these cases could have been decided in the same manner upon this principle, and in every way consistently with the doctrine already developed by this court. A contrary decision would have been directly in conflict with the "usage" principle.

In *Dayton Brass Castings Company vs. Gilligan*, 267 *Fed.* 872 (U. S. District Court), decided September 23, 1920, an issue similar to that in *Worth Brothers Company vs. Lederer*, 251 *U. S.* 507, and *Forged Steel Wheel Company vs. Lewellyn*, 251 *U. S.* 511, was before the court. The question was whether a subcontractor who cast metal, furnished by the principal contractor, into rough castings and returned them to the principal contractor to

be finished for use in shell fuses, was the manufacturer of parts under the same Munitions Manufacturers' Tax Act of September 18, 1916. One inquiry was whether such forgings were parts. The Court found that while additional manufacturing processes had to be applied to the forgings furnished by the plaintiff as subcontractor, that nevertheless,

> "The articles produced by plaintiff by reason of peculiar characteristics (their form being one of them) lost their identity as commercial commodities and, without further treatment, could not be used for any purpose other than that for which they were respectively intended."

Hence the Court found that these forgings were parts.

Here again we have the operation of the rule of chief use. It is clear that as soon as the forgings in question reached the point where they had no other common, general and practical use as a commercial commodity than as parts of the projectile fuse in question, their chief use was for that purpose and they properly were parts of such a shell fuse.

So far as we are aware there are no later cases in this court upon the question of chief use than those discussed above, and we believe that all the decisions in this Court which have a material relation to the development of that doctrine have been discussed herein. We have found no inconsistency, conflict nor divergency among them and submit that the matured rule as laid down in *Magone vs. Heller*, 150 *U. S.* 70 and reaffirmed in *Magone vs. Wiederer*, 159 *U. S.* 555, is a correct statement of this principle.

*The Application of the Usage Doctrine to the Decision Now Under Review.*

*We submit that the principle evolved by the Court below is in material conflict with the chief use rule.*

In the opinion cited (*Cole Storage Battery Company vs. U. S.*, 65 *Ct. Cls.* 164) as the single authority for its decision the lower Court stresses the fact that the petitioner's storage battery was,

> "advertised as to meet the essential requirements of locomotive power"

and that the petitioner,

> "seeks the custom of the automobile trade, assures the latter of the especial qualities of his battery."

That the intentions of the seller, the intentions of the buyer, and even the actual use by the buyer, of the article in question, is immaterial in determining what the article is at the moment the duty attaches, is made clear in *Worthington vs. Robbins*, 139 *U. S.* 337 (Discussed at page 27 supra) where "white hard enamel" was held not to be "watch material" even though imported with the intention to use it on the face of watches and it was admitted that the material was actually so used. In *Magone vs. Wiederer*, 150 *U. S.* 555 (discussed at page 29 supra), the articles of glass in question were shown to have been imported, cut to size and ready for use as clock faces without further processing, by two clock manufac-

turing companies. Nevertheless this Court declared that the test of whether the articles were "parts of clocks" depended upon whether they had no other common, general, and practical use.

Hence, the fact that the manufacturer of storage batteries seeks the automobile industry as a market for his wares, and declares the effectiveness of his product for use in that industry, cannot destroy the common, general and practical use of his product in other industries, nor confine the product to use as a part of an automobile, automobile truck, automobile wagon, or motorcycle. At most, his sales efforts are but evidence of possible usage.

Again the Court of Claims implies that the petitioner's electric battery was

> "especially adapted for and so designed * * * as to meet the essential requirements of locomotive power."

In *Magone vs. Weiderer*, 159 *U. S.* 555 (as we have seen at pages 29-31 supra), the beveled glass in question was manufactured, according to the size specifications furnished by the importer, for use in making clocks. None the less, this Court specifically held that notwithstanding such design, adaptation and subsequent use, the jury must find, as a matter of fact, whether the articles are chiefly used as parts for clocks before the articles could be classified as "parts of clocks." In *Worthington vs. Robbins*, there is no doubt that the "white hard enamel" was designed and especially adapted to meet the essential requirement of watch face enamel. Nothing in

its design, however, confined it to that use.

Is it not clear from these decisions that even if batteries be specially designed for use in automobiles, since the same batteries are commonly, generally and practically used for various other purposes, they cannot be parts or accessories for automobiles?

The Court of Claims appears to put great weight on the fact that the accomplishment of the gasoline engine in an automobile is only obtainable with a storage battery and

"without its presence the mechanism is useless."

Was not a glass essential to the glass face of the clocks referred to in *Magone vs. Wiederer*, 159 *U. S.* 555? (See pages 29-31 supra). Was not the pearl essential to the pearl handled knife considered in *U. S. vs. U. S. Express Company*, 94 *Fed.* 642? (See pages 31-32 supra).

Can any signal system, railway switch, telephone, fire alarm, motor boat, farm tractor, radio, etc., etc., designed to operate with a storage battery furnishing current, operate when that battery is not functioning? Without arranging for another source of supply of the current required, could any of the devices in which a storage battery furnishes the power or current required, operate without the battery? A moment's consideration will show that the storage battery is just as essential to the operation of the many and various assemblies commonly, generally and practically designed to employ it as is the storage battery essential to the functioning of an automobile.

In the light of the doctrine of usage, as developed by this Court, we submit that the rule announced by the Court of Claims in *Cole Storage Battery Company vs. U. S.*, 65 *Ct. Cls.* 164, and cited as authority for the finding in the case at bar, is erroneous. Specifically, that pronouncement fails:

to give controlling weight to the common, practical and profitable use and sale of electric storage batteries for a number of purposes other than with the automotive vehicles designated in the statute;

to give adequate weight to the established character of the electric storage battery as a commercial commodity prior to the advent of the automobile;

to consider, as well as in the case of automobiles, the necessity of the electric storage battery to the functioning of any device depending upon it for a source of power;

to declare that to constitute electric storage batteries parts or accessories for the vehicles mentioned in the statute, the batteries must not only be designed and adapted for use in those automotive vehicles but the batteries must have no common, general and practical use on other devices.

(C) *Correct statutory interpretation demonstrates that the electric storage batteries sold by this petitioner were not parts or accessories for automobiles and the vehicles designated in the statute and that these batteries were not intended to be taxed.*

Since 1913 the petitioner has made and sold electric

storage batteries of the kind used long before the advent of the automobile in various mechanical devices requiring a readily accessible and dependable flow of electric current. These batteries are regularly sold for, and used in, signal apparatus, stationary gasoline engines, motor boats, tractors, lighting plants, airplanes, mining cars, railway switches, wireless, telephones, telegraph, radios, fire alarms, door bells, electro-plating machines, etc. These uses are not occasional only but are upon a commercial scale, profitable, practical and common. The sales taxed by the respondent were made to electric storage battery distributors, jobbers, garage men, accessory dealers and radio dealers. The petitioner could not know to what use its batteries would be put when sold by it.

The terminals on a battery determine the purpose for which the battery may be used. The petitioner did not manufacture such terminals and ninety-nine per cent of its product left its factory without any terminals, and with no knowledge in the petitioner as to what sort of terminals were going on its batteries after they were sold.

The Commissioner of Internal Revenue ruled that these electric storage batteries sold by the petitioner were "parts or accessories" for automobile trucks, automobile wagons, other automobiles, or motor cycles and that their sale to other than manufacturers, producers or importers of automobiles was taxable under Sections 900 of the Revenue Acts of 1918 and 1921. On this ruling he collected the taxes which are the subject of this suit.

The extended and broadly inclusive terms employed in the neighboring subsections of the taxing statute re-

strict the use of the phrase "parts and accessories" for automobiles, etc., to those articles which, strictly speaking, are parts or accessories of the vehicles designated in the statutes. If it had been intended to tax electric storage batteries which are used equally with other devices as they are with automobiles, etc., those devices themselves would have been taxed. If it had been intended to tax electric storage batteries they are of sufficient commercial importance to warrant specific designation in the statute in the same manner in which other articles are named.

Hence, it should be concluded that petitioner's electric storage batteries commercially used for many purposes other than for automobiles, etc., are not taxable as parts or accessories for automobiles and the vehicles named in the statute.

The petitioner's electric storage batteries are neither commercially nor commonly, in the ordinary use of the language, known as "automobile storage batteries." Hence, it cannot be properly implied that the term "parts or accessories" for automobiles, etc., includes these electric storage batteries. They were never intended to come within this taxing classification.

The petitioner's batteries were commonly, generally, practically and profitably sold for use in and actually used in many and various devices which were not automobiles, automobile trucks, automobile wagons or motor cycles. They were not limited to use in the vehicles named. Hence, they were not parts or accessories for these vehicles.

## CONCLUSION

It is respectfully submitted that the judgment of the Court of Claims should be reversed, and the cause remanded, with direction to enter judgment for your petitioner.

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## APPENDIX

*Revenue Act of* 1918, *C.* 18, 40 *Stat,* 1057, *Title IX.—Excise Taxes*

SEC. 900. That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

(1) Automobile trucks and automobile wagons, (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

(2) Other automobiles and motorcycles, (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

(3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;

(4) Pianos, organs (other than pipe organs), piano players, graphophones, phonographs. talking machines, music boxes, and records used in connection with any musical instrument, piano player, graphophone, phonograph, or talking machine, 5 per centum;

(5) Tennis rackets, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles and cushions, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, football helmets, harness and

goals, basket-ball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, chess and checker boards and pieces, dice, games and parts of games (except playing cards and children's toys and games), and all similar articles commonly or commercially known as sporting goods, 10 per centum;

(6) Chewing gum or substitutes therefor, 3 per centum;

(7) Cameras, weighing not more than 100 pounds, 10 per centum;

(8) Photographic films and plates, other than moving-picture films, 5 per centum;

(9) Candy, 5 per centum;

(10) Firearms, shells, and cartridges, except those sold for the use of the United States, any State, Territory, or possession of the United States, any political subdivision thereof, the District of Columbia, or any foreign country while engaged against the German Government in the present war, 10 per centum;

(11) Hunting and bowie knives, 10 per centum;

(12) Dirk knives, daggers, sword canes, stillettos, and brass or metallic knuckles, 100 per centum;

(13) Portable electric fans, 5 per centum;

(14) Thermos and thermostatic bottles, carafes, jugs, or other thermostatic containers, 5 per centum;

(15) Cigar or cigarette holders and pipes, composed wholly or in part of meerschaum or amber, humidors, and smoking stands, 10 per centum;

(16) Automatic slot-device vending machines, 5 per centum, and automatic, slot-device weighing machines, 10 per centum; if the manufacturer, producer, or importer of any such machine operates it for profit, he shall pay

a tax in respect to each such machine put into operation equivalent to 5 per centum of its fair market value in the case of a vending machine, and 10 per centum of its fair market value in the case of a weighing machine;

(17) Liveries and livery boots and hats, 10 per centum;

(18) Hunting and shooting garments and riding habits, 10 per centum;

(19) Articles made of fur on the hide or pelt, or of which any such fur is the component material of chief value, 10 per centum;

(20) Yachts and motor boats not designed for trade, fishing, or national defense; and pleasure boats and pleasure canoes if sold for more than $15, 10 per centum; and

(21) Toilet soaps and toilet soap powders, 3 per centum.

If any manufacturer, producer, or importer of any of the articles enumerated in this section customarily sells such articles both at wholesale and at retail, the tax in the case of any article sold by him at retail shall be computed on the price for which like articles are sold by him at wholesale.

The taxes imposed by this section shall, in the case of any article in respect to which a corresponding tax is imposed by section 600 of the Revenue Act of 1917, be in lieu of such tax.

SEC. 907. (a) That on and after May 1, 1919, there shall be levied, assessed, collected and paid (in lieu of the taxes imposed by subdivisions (g) and (h) of section 600 of the Revenue Act of 1917) a tax of 1 cent for each 25 cents or fraction thereof of the amount paid for any of the following articles when sold by or for a dealer or his estate on or after such date for consumption or use:

(1) Perfumes, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings,

hair restoratives, hair dyes, tooth and mouth washes, dentifrices, tooth pastes, aromatic cachous, toilet powders (other than soap powders), or any similar substance, article, or preparation by whatsoever name known or distinguished, any of the above which are used or applied or intended to be used or applied for toilet purposes;

(2) Pills, tablets, powders, tinctures, troches or lozenges, sirups, medicinal cordials or bitters, anodynes, tonics, plasters, liniments, salves, ointments, pastes, drops, waters (except those taxed under section 628 of this Act), essences, spirits, oils, and other medicinal preparations, compounds, or compositions (not including serums and antitoxins), upon the amount paid for any of the above as to which the manufacturer or producer claims to have any private formula, secret, or occult art for making or preparing the same, or has or claims to have any exclusive right or title to the making or preparing the same, or which are prepared, uttered, vended, or exposed for sale under any letters patent, or trade-mark, or which (if prepared by any formula, published or unpublished) are held out or recommended to the public by the makers, vendors, or proprietors thereof as proprietary medicines or medicinal proprietary articles or preparations, or as remedies or specifics for any disease, diseases, or affection whatever affecting the human or animal body: *Provided*, That the provisions of this section shall not apply to the sale of vaccines and bacterines which are not advertised to the general lay public, nor to the sale by a physician in personal attendance upon a patient of medicinal preparations not so advertised.

(b) The taxes imposed by this section shall be collected by whichever of the following methods the Commissioner may deem expedient: (1) by stamp affixed to such article by the vendor, the cost of which shall be rein-

bursed to the vendor by the purchaser; or (2) by payment to the vendor by the purchaser at the time of the sale, the taxes so collected being returned and paid to the United States by such vendor in the same manner as provided in section 502.